December, 1994

HONOR ROLL

421st Session, Basic Law Enforcement Academy - August 2 through October 21, 1994

President:	*Officer Daniel J. Bresnahan - Seattle Police Department*
Best Overall:	*Deputy William F. Lonon, Jr. - Jefferson County Sheriff's Department*
Best Academic:	*Deputy Ronald A. Rockness - Whitman County Sheriff's Department*
Best Firearms:	*Officer Stephen E. Clinko, Jr. - Seattle Police Department*

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Corrections Officer Academy - Class 201 - October 10 through November 4, 1994

Highest Overall:	*Officer Mark P. Wallace - Pierce County Jail*
Highest Academic:	*Officer Stephen C. Forney - Benton County Corrections*
Highest Practical Test:	*Officer Mark P. Wallace - Pierce County Jail*
	Officer Howard P. Warren - Pierce County Jail
Highest in Mock Scenes:	*Officer Michael J. Stutzke - Columbia County Corrections*
	Officer Mark P. Wallace - Pierce County Jail
	Officer Stacy Dean Peters - DOC/Tacoma Pre-Release
Highest Defensive Tactics:	*Officer Michael J. Stutzke - Columbia County Corrections*

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1994 SUBJECT MATTER INDEX

LED EDITOR'S NOTE: This is our fourteenth periodic LED subject-matter index since 1979. It covers all LED entries from January 1994 through December 1994. We have also

published multi-year, cumulative subject matter indexes on two occasions. In 1989, we published a ten-year subject-matter index covering LED's from January 1979 through December 1988. In 1994, we published a five-year subject matter index covering LED's from January 1988 through December 1993. For each of the multi-year indexes, distribution was limited to one per agency due to the size of the index and attendant copying costs.

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WASHINGTON STATE SUPREME COURT

NO SEARCH VIOLATION WHERE, DURING WARRANT EXECUTION, OFFICER ANSWERED PHONE AND MADE "DRUG DEAL" WITH CALLER WHO REQUESTED "AN EIGHTH"

State v. Goucher, 124 Wn.2d 778 (1994)

Facts and Proceedings: (Excerpted from State Supreme Court opinion)

> On or about October 23, 1992, a Cowlitz County district court judge granted a request for a search warrant presented by members of the Cowlitz-Wahkiakum County Narcotics Task Force. The search warrant was for the person and residence of Jose Luis Garcia-Lopez, and was based on a confidential informant's statement that Garcia-Lopez was selling cocaine at his residence. The supporting affidavit stated that the informant told Garcia-Lopez he/she might need to buy some more cocaine in the future, and that Garcia-Lopez "'told [the informant] to go ahead and call and he would have it available.'" While the warrant incorporated the affidavit by reference, neither document specifically referred to a search or seizure of any telephones at the Garcia-Lopez residence.
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> The search warrant was executed on October 23, 1992. During the search of the residence and the four persons found therein, the telephone rang and was answered by a task force detective. When an adult male asked for Luis, the detective told him that Luis had gone on a run and that he (the detective) was handling business until Luis returned.
>
> The caller identified himself as Mike Goucher and said he was calling from a pay phone. He asked if he could come over and buy "an eighth", which the detective understood to mean an eighth of an ounce of cocaine. The detective told Goucher to come over, but not until 11;30 p.m., as he had someone coming before Goucher.
>
> The task force members then obtained some previously seized, pretested cocaine. One of the detectives was designated to act as the seller and took possession of the cocaine. At about 11:35 p.m. a man came to the Garcia-Lopez residence and said he was Mike who had called earlier. The detective asked Mike if he had the money, whereupon Mike took $40 from his pocket. The detective then gave Mike a bindle of cocaine, which Mike examined. When Mike remarked that it was a bit light, the detective agreed and gave him another bindle.
>
> Mike told the detective he had been dealing with Luis for some time and had established a relationship of trust with him. The detective then showed Mike his badge and placed him under arrest. Mike was fully identified as Harold Michael Goucher, hereafter referred to as the Defendant.
>
> After the detectives recovered the first bindle of cocaine from the Defendant's sock, he was advised of his rights. He waived them and admitted having come to buy cocaine that night and to having purchased it from Garcia-Lopez before.
>
> By information filed on October 29, 1992, the Cowlitz County prosecutor charged the Defendant with one count of possessing cocaine. The Defendant then moved

to suppress the evidence obtained as a result of the detective answering the telephone in Garcia-Lopez' residence.

The trial judge denied the motion to suppress, concluding that the Defendant had no expectation of privacy in arranging the cocaine purchase at Garcia-Lopez' residence and that the officers were at the residence under authority of a valid search warrant. The judge further concluded that the supporting affidavit gave the officers reason to answer the telephone at the residence when it rang and to make such cocaine deals as the callers sought to make.

Following the denial of his motion to suppress, the Defendant stipulated to the facts and the court found him guilty as charged.

ISSUE AND RULING: Did the officer's action in answering the phone and setting up a cocaine transaction with Goucher violate article 1, section 7 of the Washington constitution? (ANSWER: No) Result: Cowlitz County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS:

After explaining that the Fourth Amendment of the Federal Constitution does not proscribe the officer's conduct at issue in this case, the Court turns to the more restrictive article 1, section 7 of the Washington constitution. The Court begins its analysis under article 1, section 7 as follows:

> We emphasize here if the State has not intruded unreasonably into someone's private affairs, no search has occurred and article 1, section 7 has not been violated. See State v. Young, 123 Wn.2d 173 (1994) **[requiring search warrant for use of thermal imaging device to detect heat loss from home -- April '94 LED:02]**. In Young, this court explained that "what is voluntarily exposed to the general public" is not considered part of a person's private affairs.
>
> In this case, the Defendant voluntarily exposed his desire to buy drugs to someone he did not know. While he states that "[i]n today's world, the telephone is the primary means for personal communication with friends, loved ones, and business relations", he neglects to observe that his conversation was with an acknowledged stranger. The State's contention that the Defendant waived his claim of privacy by dealing with a stranger thus has merit. A privacy interest must be reasonable to warrant protection even under article 1, section 7. As one commentator has stated, "a 'private affairs' interest may be defined as a matter or object personal to an individual such that intruding upon it would offend a reasonable person."
>
> The Court of Appeals addressed this concept in relation to telephone records in State v. Butterworth, 48 Wn. App. 152 (1987) **[Aug. '87 LED:19]**. At issue in Butterworth was whether police validly obtained the defendant's unpublished address and telephone number by requesting it from the telephone company. The defendant contended that the police unreasonably intruded into his private affairs when they obtained his address without a search warrant or other valid legal process.

The Butterworth court observed that in Gunwall, this court specifically concluded that a telephone subscriber has a protected privacy interest under article 1, section 7, in the records of the calls she makes. The court then addressed an additional consideration presented by the Butterworth facts:

> Indeed, since Butterworth specifically requested privacy regarding his address and telephone number in asking for an unpublished listing, we need not resort to assumptions about his expectation of privacy. Gunwall makes clear that the disclosure of this information to the telephone company for internal business purposes does not alter the degree of privacy to which a citizen is constitutionally entitled.

The Court of Appeals thus concluded that when the police obtained Butterworth's address without authority of law, they violated article 1, section 7.

In contrast, the Defendant in the present case did not make any special effort to protect his privacy. What is at issue here is the degree of privacy accorded a conversation voluntarily engaged in with an acknowledged stranger.

[Some citations omitted]

The Court then addresses Goucher's argument that cases under chapter 9.73 RCW Washington's "privacy act," support his case. The Court explains why this is not so:

> Cases discussing the nature of communications protected under the privacy act do no more than the act itself to support the Defendant's insistence that his conversation with the detective was private. To determine whether a telephone conversation warrants privacy act protection, a court must consider the intent of the participants as manifested by the facts and circumstances of each case. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178 (1992) **[Aug. '92 LED:06]**. In Kadoranian, the plaintiff objected to the interception and recording of a telephone conversation in which she told an unidentified caller that her father was not at home. This court did not consider this communication sufficiently private to warrant privacy act protection. "It does not appear that Ms. Kadoranian intended to keep the information . . . 'secret' or that she had any expectation that her conversation was private."
>
> The Court of Appeals made similar observations in holding that a telephone call made to a telepager did not constitute a private communication in State v. Wojtyna, 70 Wn. App. 689 (1993) **[Dec. '93 LED:20]**. The court reasoned that by transmitting his number into a pager, Wojtyna ran the risk that it would be received by whoever was in possession or that the owner or someone in possession would disclose the contents. The confidentiality of the transmission was uncertain and there is no reason to find that it was intended to be private.
>
> While the intent of the participants does not define the scope of a person's private affairs under the state constitution, we do find intent of relevance to that definition. In this case, the Defendant made no attempt to keep his desire to buy drugs a secret from someone he did not know. By dealing with someone other than

> Garcia-Lopez, the Defendant accepted the risk that his drug purchase would not be confidential. We do not see how the conversation between the Defendant and the detective constituted an unreasonable intrusion into the Defendant's private affairs and thus we find no violation of the state constitution in this case.

[Some citations and quotation marks omitted]

LED EDITOR'S NOTE: Defendant also raised an issue regarding the scope of the search warrant, arguing that the officers exceeded the scope of the warrant in answering the phone. The Court holds that defendant lacked standing to raise this question. The Court looks at the question of whether the "automatic standing" rule continues to apply in Washington, but declines to answer the question, just as it declined to answer the question in State v. Zakel, 119 Wn.2d 563 (1992) Nov. '92:06.

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WASHINGTON STATE COURT OF APPEALS

"PRETEXT" STOP RULE IS SEEN AS A LIMITED OBJECTIVE STANDARD

State v. Chapin, 75 Wn. App. 460 (Div. I, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On March 22, 1987, while on road patrol, Officer David Zander of the Snohomish County Sheriff's Office saw a pickup truck pull out from behind an abandoned gas station. He followed it and noticed that the rear license plate was displayed in the rear window of the vehicle, rather than mounted on the bumper as required by law. [RCW 46.16.240] When he stopped the vehicle, he observed that the passenger, Chapin, was not wearing a seatbelt. Zander asked Chapin and the driver for identification and discovered that Chapin had outstanding warrants for his arrest. Zander placed Chapin under arrest and searched the vehicle. He discovered a pager, open alcohol containers, a wallet containing approximately $1,100, a container with marijuana in it and a case containing drug paraphernalia and cocaine. Chapin was subsequently charged with possession of a controlled substance.
>
> On July 29, 1988, while the possession case was pending, Chapin sold an ounce of cocaine to Douglas Woody, an undercover police informant. Chapin was arrested and charged with possession of cocaine with intent to deliver.
>
> Before his trial on the possession charge, Chapin moved to suppress the evidence Zander seized from the vehicle. The motion was denied. The trial date for that case was then continued until after trial of the possession with intent to deliver case. In the first trial, the court admitted evidence that was the subject of Chapin's motion to suppress in the possession case. Chapin was ultimately found guilty of both charges.

ISSUE AND RULING: (1) Is the "pretext" stop rule a subjective or objective standard? (ANSWER: It is a qualified objective ("reasonable officer") standard which focuses in large part

on "normal" police practices and procedures); (2) Was the stop in the case a pretext stop? (ANSWER: No) Result: Snohomish County Superior Court convictions for possession of cocaine and possession of cocaine with intent to deliver affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under RCW 46.16.240, Zander had the authority to stop the vehicle to investigate the license plate infraction. Upon observing that Chapin was not wearing his seatbelt, a violation of RCW 46.61.688(3) and (5), Zander then had authority to request Chapin's identification pursuant to RCW 46.61.021(3). Since he had legal authority to stop the vehicle and request Chapin's identification, the final inquiry is whether the stop for a license plate infraction was a pretext to allow Zander to conduct a further investigation of what he considered suspicious circumstances.
>
> It is well-established that a stop may not be used as a pretext to search for evidence. "A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they did not have the reasonable suspicion necessary to support a stop." A pretextual stop constitutes an unreasonable seizure that violates the Fourth Amendment and, therefore, renders what would otherwise be a lawful search an unconstitutional one. Consequently, where a search is conducted pursuant to a pretextual stop, any evidence obtained from the search must be suppressed under the exclusionary rule.
>
> The pretext rule was designed to prevent the use of minor traffic violations as a justification to stop cars and search them in the hope of recovering evidence of a more serious crime for which the police lacked a legal basis to search. The need for the pretext rule in the context of searches based entirely on minor traffic infractions has been largely obviated in this State by the Legislature's decriminalization of most minor traffic offenses, including the one for which the vehicle in this case was stopped. Under case law and by statute, the police may not effect a custodial arrest for minor traffic infractions as defined by RCW 46.63.020 unless certain circumstances not applicable here apply. Therefore, a vehicle may not ordinarily be searched pursuant to a traffic infraction. The need for the pretext rule has not disappeared entirely, however, as the sequence of events in this case demonstrates. Although the police may not effect a custodial arrest for a minor traffic infraction, it is still possible to stop a vehicle as a pretext to detain a person suspected of other criminal activity, allowing the officer to determine whether a person in the vehicle has an outstanding warrant and, if so, to search the vehicle incident to arrest on the warrant.
>
> The parties dispute whether inquiries under the pretext rule should be governed by a subjective or an objective standard. We reject the subjective approach under which the officer's motive in effecting the arrest forms the basis of the inquiry. See e.g., United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) ("[w]hether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers"). We find this approach inconsistent with Fourth Amendment jurisprudence and inherently problematic. A subjective approach would require courts to engage in the difficult, if not impossible, task of determining what an officer's mental process and personal motivations were in effecting a traffic stop.

We hold that the appropriate inquiry in determining whether a stop is pretextual is an objective one. In doing so, we adopt the reasoning of the Tenth Circuit in United States v. Guzman, 864 F.2d 1512 (1988), insofar as it is consistent with our opinion. As the Guzman court noted, even among courts adhering to an objective approach, two different tests have emerged. The first is a "pure objective" approach under which the court inquires only whether the officer was acting pursuant to lawful authority. The second focuses on whether the officer's conduct was objectively reasonable by looking at whether he or she deviated from normal procedures in effecting a stop.

We decline to follow a pure objective approach for two reasons. First, if a court's inquiry is limited to determining whether the police had a lawful basis for making the stop which lead to the search and/or seizure, logically there can no longer be a pretext rule. This is because, under a pure objective approach, an officer's actions are per se reasonable if they are pursuant to lawful authority. The entire purpose of the pretext rule is to deter police from using their lawful authority to detain a person for a minor offense in order to investigate or search for evidence of a more serious offense. Thus, the predicate for invoking the pretext rule is the officer's lawful act. Under a pure objective approach, there can logically be no pretextual stops because, where the officer is acting lawfully, his or her actions are defined as objectively reasonable. We reject this approach because it extinguishes the rule.

Second, under a pure objective approach, there is no basis for judicial review of an officer's use of the discretionary power to stop so long as the stop has a lawful basis.

We think the better approach is the one articulated in Guzman. We hold that a stop is reasonable and, therefore, constitutional if a reasonable officer would have made the stop in the absence of an improper purpose. Under this approach, the proper focus is not the arresting officer's subjective motivation, but rather, the objective reasonableness of his or her conduct. We determine the reasonableness of the officer's actions by the circumstances surrounding the stop, including whether the officer was following standard procedures or routine practices in effecting a stop. An officer's adherence to normal practices and procedures is significant in that an improper or pretextual motive may be inferred where there is a discernable departure from them. [COURT'S FOOTNOTE: This is not the only factor that may be relevant in determining whether a stop was a pretext in a particular case. However, it is highly probative of whether a reasonable officer would have stopped the vehicle under the same circumstances.]

Applying the objective test to the facts of this case, we conclude that the stop for a license plate infraction was not pretextual because, under the same circumstances, a reasonable officer would have made the stop. Zander was on road patrol when he noticed the traffic infraction. One of the normal duties of an officer on road patrol is to enforce traffic regulations. There is nothing to suggest that he departed from normal procedures in making the stop. Zander also testified that running a warrant check is a standard procedure when investigating traffic infractions. [COURT'S FOOTNOTE: We do not, by adopting the objective approach, intend to turn suppression hearings into a lengthy debate over the

normal practices and procedures of the police agency in question. Normally, the testimony of the officer involved in the stop should suffice to establish what those practices and procedures are.] Although Zander may also have stopped the vehicle in order to satisfy his curiosity, his actions were objectively reasonable. The court properly denied Chapin's motion to suppress evidence.

[Some text, citations and footnotes omitted]

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UPDATE ON MOTORCYCLE HELMET LAW ENFORCEMENT

Effective July 29, 1994 (by emergency regulation and permanent regulation) the Washington State Patrol amended WAC 204-10-040, its regulation on motorcycle helmets. It is believed that this amendment cures the "notice defect found in the regulation by the Court of Appeals in State v. Maxwell, 74 Wn. App. 699 (1994), and that the helmet law is currently enforceable. [Note: there is an opposing view from the motorcycle group, ABATE, which argues that the Maxwell ruling invalidated both the statute -- RCW 47.530 -- and the regulation relating to motorcycle helmets.] In bill-draft form, the July 29, 1994 revision to the regulation reads as follows:

> **WAC 204-10-040 Motorcycle helmets**. (1) The Washington state patrol has hereby adopted by reference, Federal Motor Vehicle Safety Standard 218 ((~~is hereby adopted by reference~~)) (49 C.F.R. Sec. 571.218) as the standard for motorcycle helmets.
>
> (2) Motorcycle helmets are to meet the following Federal Motor Vehicle Safety Standard 218, labeling requirements. Each helmet shall be labeled permanently and legibly, in a manner such that the label(s) can be read easily without removing padding or any other permanent part, with the following:
>
> (a) Manufacturer's name or identification.
> (b) Precise model designation.
> (c) Size.
> (d) Month and year of manufacture. This may be spelled out (e.g., june 1988), or expressed in numeral (e.g., 6/99).
> (e) The symbol DOT, constituting the manufacturer's certification that the helmet conforms to the applicable Federal Motor Vehicle Safety Standard. This symbol shall appear on the outer surface, in a color that contrasts with the background, in letters at least three-eights inch (one centimeter) high.
> (f) Instructions to the purchaser as follows:
> (i) "Shell and liner constructed on (identify type(s) of materials)."
> (ii) "Helmet can be seriously damaged by some common substances without damage being visible to the user. Apply only the following: (Recommended cleaning agents, paints, adhesives, etc., as appropriate.)"
> (iii) "Make no modifications. Fasten helmet securely. If helmet experiences a severe blow, return it to the manufacturer for inspection, or destroy it and replace it."
> (iv) Any additional relevant safety information should be applied at the time of purchase by means of an attached tag, brochure, or other suitable

means.

(3) If a motorcycle helmet meeting the above federal requirements is to be equipped with an electronic device for transmitting sound, the speaker portion, affixed to the helmet, must not enter or completely block the ear canals.

Some Washington agencies, including WSP, are presently issuing citations under RCW 46.37.530, while some others are waiting to see if the 1995 Washington Legislature will clarify the statute. Check with your prosecutor or legal advisor.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.